

Humanitarian Intervention

Legality and legitimacy

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1 Introduction

1.1 Background

The subject of humanitarian intervention in international relations and its legitimacy, has been debated for the long period of time. The concept of state sovereignty, which derives both from customary law and the UN Charter, as defining principle of interstate relations, stands in direct conflict with legality of the doctrine of humanitarian intervention because of the principle of non-intervention, which denounces all forms of interference in the internal affairs of sovereign states.

The principle of state sovereignty remains one of the fundamentally important principles in the international law and has the main role in the maintenance of world order and peace. On the other side, the increasing international concern for human rights protection and humanitarian necessities have led to armed interference by one or several states into internal affairs of another state and to violation of sovereignty of target state. The two columns of international law – state sovereignty and concern for human rights are in state of tension, and the greatest challenge of both theorists and practitioners is to solve it. Opinions of scholars, politicians and state practice still disagree regarding the question whether the right to intervene exists and what is its normative range.

Extensive changes of the world occurred with the end of the Cold War. International community, no longer characterized by two major powers set against each other, confronted with many challenges that led to the re-examining of the notion of sovereignty and intervention. The central points of debate are the questions: why the concept of state sovereignty should be re-defined, who should perform interventions and how.

There is a division amongst theorists regarding those questions. One viewpoint is that intervention for the sake of humanity cannot be permissible, justifiable or legal. The other is that forcible action to stop serious human rights deprivations is permitted by international law.

The contradictory nature of the term of humanitarian intervention was the reason I found it most interesting to study and analyse in the field of international law. In addition, as a citizen of Serbia (FRY at the time), I personally witnessed the humanitarian intervention

that is, by the great number of examiners, considered the most controversial due to the fact that it was undertaken without the UN authorization; nevertheless I tried to be as objective as possible. Both reasons mentioned, made this topic for me an exceptional challenge.

1.2 Object and purpose of the study

Throughout this paper I will examine the notion of the doctrine of humanitarian intervention and its relation with state sovereignty as the fundamental principle and the basis of the modern world order. The purpose of this thesis is to determine whether armed humanitarian intervention undertaken to prevent or stop serious human rights violations is legal and legitimate.

1.3 Sources and methodology

The topic of humanitarian intervention demands interdisciplinary approach – from human rights, international relations, politics to ethics and philosophy - since ethical, legal and political conditions are all relevant to the evaluation of the doctrine. In this paper I also examined state practice. My approach to the topic requires the use of research methods from the social sciences. The main sources used in this paper are the UN Charter, GA Resolutions, the 2001 ICISS Report “The Responsibility to protect” , the 1969 Vienna Convention on the Law of Treaties and books and journals written by legal scholars and theorists.

1.4 Demarcation of thesis

This thesis attempts to establish whether a legal and legitimate basis for humanitarian intervention exists. Exploring legal basis, it examines both customary law and the UN Charter. Searching for legitimate basis for the doctrine, it investigates are there the minimum duties of states in protecting the rights of their citizens as elements of their sovereignty and what is that minimum; does unobservance of these duties, if they exist, justify humanitarian intervention and in which way it can be successfully employed. Analysing the evolution of the doctrine and practice of humanitarian intervention, this paper tries to find the solution of this issue.

1.5 Structure of the study

In order to reach a conclusion, Chapter 2 discusses the concepts of sovereignty and humanitarian intervention, their definitions, purposes and limits, historical evolution and

three basic theoretical approaches to the doctrine of humanitarian intervention. It concludes that state sovereignty co-existed with the principle of unilateral humanitarian intervention since the establishment of the state system, that unilateral humanitarian intervention was widely accepted as legal under customary law before UN Charter and that the concept of sovereignty has been re-defined.

Chapter 3 discusses the status of humanitarian intervention under the UN Charter, examining the provisions of the Charter on the use of force and textual, intent and policy arguments of theorists. It concludes that unilateral humanitarian intervention is not permitted by the UN Charter.

Chapter 4 examines whether the doctrine of humanitarian intervention has evolved into a rule of customary international law. Analysing the process of formation of customary rules in international law, it concludes that unilateral humanitarian intervention is gradually developing into a rule of customary law, but not fully took shape yet.

Chapter 5 is a case study of humanitarian interventions that occurred in pre-Charter, post-Charter and post-Cold War era. It concludes that during the nineteenth and early twentieth century the doctrinal writings and the state practice were in favor of the recognition of the right of humanitarian intervention, that the UN Charter did not find it inconsistent with the purposes of the UN, that during the Cold War period the doctrine did not enjoy wide support in state practice, whilst post Cold-War practice suggests that states employ more extensive conception of humanitarian intervention and a growing support for the doctrine.

Finally, I conclude that the doctrine of unilateral humanitarian intervention has a significant role in interaction of the members of international community and although it is not permitted under international law it should be allowed in cases of massive violations of human rights. Considering that there is a possibility of abuse, the use of the doctrine must be regulated in a clear and precise way.

2 Sovereignty and humanitarian intervention

2.1 State sovereignty and the principle of non-intervention

Sovereignty of states is the foundation of interstate relations for the past several centuries. It is also the basis of the modern world order. But the idea of sovereignty traces back to ancient Rome where was formulated as the power of the Emperor and to XVI century when Jean Bodin defines the sovereign as a ruler subjected only to the natural law, divine law and the law of nations. Sovereignty is “the most high, absolute and perpetual power over the citizens and subjects in a Commonweale...the greatest power to command.”¹

Hugo Grotius defined sovereignty as “that power whose acts are not subject to the control of another, so that they may be made void by the act of any other human will.”² Thomas Hobbes “regarded sovereignty as absolute, unified, inalienable, based upon a voluntary but irrevocable contract”³ According to the number of international law researchers, the concept of state sovereignty was established in the Treaties of Westphalia in 1648 which ended almost three decades of war in Europe and initiated new order, based on the national sovereignty. The Peace of Westphalia “did not sanction the right of rulers to do whatever they pleased within their own territories”⁴

As the idea of the final and absolute authority in the state, the concept of sovereignty is recognized in the United Nations Charter as one of the main principles of international law. The principle of the sovereign equality of all states is adopted in art. 2(1) of the UN Charter. The prohibition of interference in the domestic affairs of sovereign states by other sovereign states, especially of the threat of use of force lays down in art. 2(4). In order to promote the sovereignty of states UN Charter in art. 2(7) stipulates that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter.”

¹ J. Bodin, Six books of Commonweale, bk.1, chp.8 at 84, quoted in F.K. Abiew, The Evolution of the Doctrine and Practice of Humanitarian Intervention at 27 (Kluwer, 1999)

² Quoted in Ibid.

³ Ibid.

⁴ Ibid.

The meaning, purpose and limits of sovereignty, was also the subject of the mandate of the Independent International Commission on Intervention and State Sovereignty (ICISS) which was established in order to promote a global debate on the relationship between intervention and state sovereignty and to reconcile the international community's responsibility to act facing with massive violations of humanitarian norms while respecting the sovereign rights of states.

ICISS also concludes that state sovereignty is the concept that 'lies at the heart of both customary international law and the UN Charter and remains both an essential component of the maintenance of international peace and security and a defence of weak states against the strong.' According to the ICISS, "state sovereignty denotes the competence, independence and legal equality of states." "Every state is free to choose its own political, economic, cultural and social system as well as the formulation of the foreign policy. The scope of the freedom of choice of states in these matters is not unlimited; it depends on developments in international law (including agreements made voluntarily) and international relations."

The limits of the principle of state sovereignty has always been in dispute, but some of them are widely accepted. According to the UN Charter, sovereignty is not a barrier to actions of the Security Council when taking measures in the cases of "a threat to the peace, a breach of the peace or an act of aggression."⁵ Further, state sovereignty cannot be the excuse for non-performance of international obligations of the states, both customary and treaty. Sovereignty brings with it responsibility for states to protect persons and property within their territories.

In Kofi Annan's article on the "two concepts of sovereignty" in *The Economist*, he argues:

State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalization and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.

⁵ UN Charter, art. 39

Despite the crucial role of the state sovereignty notion in international relations, it has been confronting certain challenges particularly since last decades of the 20th century.

2.2 Definition of humanitarian intervention

The meaning of intervention as various forms of nonconsensual action, can be defined broadly, including even verbal remarks and narrowly, including only oppressive interference of one state regarding internal affairs of another. Many analysts consider that expression „humanitarian intervention“ combines two contradictory terms, but it is employed in almost all academic and policy literature. The term ”humanitarian” in this expression, plays the role of justification for intervention.

During the 19th century the term „intervention on the grounds of humanity“ was used to describe operations involving assistance and intervention in internal affairs of a state. At the end of 1980s the term ”right to intervene” was used to describe both operations carried out by individual States and action taken by international organizations and NGO’s.

The term „intervention“ in international law refers to prohibited intervention. According to Teson, basically three forms of „intervention” can be distinguished, depending on the degree of coercion employed. In the first place intervention simply means discussion, examination and the recommendatory action. Second, it refers to the taking of measures that are coercive in nature but short of the use of force. Finally, it is used to refer to the use of force in the domestic affairs of another state.⁶

There is no generally accepted definition of humanitarian intervention. Fernando Teson defines it as „the proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government.”⁷ The concept also can be defined as ”the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.”⁸ One possible definition runs as follows: “The theory of intervention on the ground of humanity ... recognizes the right of

⁶ Fernando Teson, *Humanitarian Intervention* at 133 (2nd ed. 1997)

⁷ Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* at 5 (1988)

⁸ F.K.Abiew, *The Evolution of the Doctrine and Practice of humanitarian intervention*, at 31 (Kluwer,1999)

one State to exercise international control over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity.“⁹

Although not identical, those definitions express what the doctrine of humanitarian intervention involves. Common features of all definitions are, first, the use of armed force and second, justification for the use of force depends on human rights violations in the target state.

2.3 Historical evolution of the principle of humanitarian intervention

2.3.1 The Law of Nature

Greek philosophers argued about the existence of a law whose content is set by nature and therefore has validity everywhere. The „father of natural law“, Aristotle posited the existence of natural justice or natural right and made some fundamental postulations about it: “One part of what is politically just is natural, and the other part legal. What is natural is what has same validity everywhere alike.“¹⁰

Stoics, the followers of a school of Hellenic philosophy, developed the tradition of natural justice. According to them, the natural law consisted of means by which a rational beings lived in accordance with order of the universe.

Natural law theories have influenced the development of English common law and are presented in works of Thomas Aquinas, Thomas Hobbes, Hugo Grotius, John Lock and some others.

The essential feature of the Law of Nature that all human beings is to be treated equally represents the foundation of the concept of inherent human rights.

2.3.2 Just war theories

The moral-political theory of just war (*bellum justum*) is historically strongly connected with the doctrine of humanitarian intervention. For the ancient Greeks, the war could be waged only if the cause of it was justified.

A philosopher and theologian St. Augustine (354-430), thoroughly influenced by Platonic doctrines, framed the concepts of original sin and just war. According to St. Augustine,

⁹ *ibid.*

¹⁰ Aristotle, *The Ethics of Aristotle: The Nichomachean Ethics* 20 (1953)

there are two key concepts of just war – a just cause and a right intention. He defined the just war „in terms of the avenging of injuries suffered, where the guilty party has refused to make amends. War was to be embarked upon to punish wrongs and restore the peaceful status quo, but no further: Agression was unjust and the recourse to violence had to be strictly controlled.“¹¹

St Thomas Aquinas in the 13th century defined the just war as „the subjective guilt of the wrongdoer that had to be punished rather than the objectively wrong activity. He wrote that war could be justified provided it was waged by the sovereign authority, it was accompanied by a just cause (i.e. the punishment of wrongdoers) and it was buttressed by the right intentions on the part of the belligerents.“¹²

With the rise of the modern age and of the European nation-states, the doctrine changed and became tied to the sovereignty of states. The new state of international affairs was reflected by the necessity of serious attempts at a peaceful resolution of the dispute that was required before turning to force. “Thus the accent in legal doctrine moved from the application of force to suppress wrongdoers to a concern (if hardly apparent at times) to maintain order by peaceful means.“¹³

The just war theory also entailed the immunity of innocent persons from direct attack and the proportionate use of force to conquer the enemy.

Hugo Grotius (1583-1645), widely considered the father of international law, laid the foundations for international law based on natural law. He separated the law of nature from the law of God and built his Law of Nations on his view of the Law of Nature. Grotius believed that the sovereign powers of the state were limited to the extent of the rights ceded by individuals. It follows that in the case of violation of the basic rights of the people by sovereign, he exceeded his jurisdiction and other states had the right to intervene in order to re-establish the order of the Law of Nature. Lauterpacht consider that „Grotius [made] the first authoritative statement of the principle of humanitarian intervention – the

¹¹ Malcolm Shaw, International Law at 415

¹² Ibid.

¹³ Ibid.

principle that exclusiveness of domestic jurisdiction stops when outrage upon humanity begins.¹⁴

According to Grotius, intention was irrelevant for the justice of war, but he considered in detail the justifiable means of waging war. He advocated the theory of proportionality, claiming that every mean that is not necessary for achieving the just cause, would be unjust. In his significant work *De Jure Belli ac Pacis* (*On the Law of War and Peace*), he argues that there are some circumstances that can justify the war and identifies three „just causes“ for war: self-defence, reparation of injury and punishment. In this work Grotius consider both questions of *jus ad bellum* (justice in the resort to war) and of *jus in bello* (justice in the conduct of war). He considered the killing of civilians, raping of women from the enemy side and forcing of innocent people into slavery the crimes of war. Sometimes, the norms that are essentially prohibited may be violated justifiably because of the necessities of war: „We may bombard a ship full of pirates or a house full of thieves, even if there are within the same ship or house a few infants, women or other innocent persons.“¹⁵

Natural law theorists of 16th and 17th centuries considered that humanitarian intervention is in conformity with the law of nature and that it is the essential part of the *bellum justum* doctrine . According to natural law, a state could intervene in the affairs of another if certain conditions were present.

2.3.3 Changes in Western philosophical political and legal theory

Views of Grotius presented in his works had a strong influence on Western political and legal theory.

The treatises of Italian Renaissance diplomat and political philosopher Niccolò Machiavelli, *The Prince* and *The Discourses on Livy* , suggest reconsidered morality in which consolidation of political power in the state is considered the highest human benefit, replacing all other ethical values and limitations. Machiavelli realized that there were no limitations on the power of the Princes in the renaissance Europe.

¹⁴ H.Lauterpacht, quoted in P.Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* at 7 (Amsterdam,Het Spinhuis 1993)

¹⁵ Hugo Grotius,*De Jure Belli ac Pacis Prolegomena*,III,I,para4(1),(1625)

He read the Bible as a secular text like a classical history work. Such approach allowed him to understand the role of religion in political life. The universal theory of rising and falling of nations that Machiavelli posted, came as the result of what he learned from the Bible about formation of Israel and from the classics about the formation of Greece and Rome. He observes that the foundation of new states is often preceded by exodus and migration and made analysis of the special character of leaders, that are distinguished of others by their virtues. Machiavelli regards human political power rather than divine power, but he doesn't discount the significance of religion, considering it essential in the governance of the state, "essential instrument for producing the belief that sustains identification and loyalty....Religion is effective in generating belief because it can intimidate the populace with words rather than requiring physical force."¹⁶

For Machiavelli, the war was the most important aspect of statecraft. "When it is a question of the safety of the country no account should be taken of what is just or unjust, merciful or cruel, laudable or shameful, but without regard to anything else, that course is to be unswervingly pursued which will save the life and pursue the liberty of the [fatherland]"¹⁷ His work *The art of war*, a thorough study of classical and contemporary military practices, was a practical proposition to the rulers of Florence, in which he explained the advantages of militia.

One of the first theorists that developed a consistent theory of sovereignty was French jurist and political philosopher Jean Bodin, whose notion of sovereignty was that the power of the sovereign must be absolute and permanent. For Bodin, a sovereign prince is one who is exempt from obedience to the laws of his predecessors and those issued by himself. A sovereign is however subjected to natural law.¹⁸

English philosopher Thomas Hobbes is remembered for his work on political philosophy and modern founder of the social contract tradition. In *Leviathan*, his main work, he set out his doctrine of the foundation of societies and legitimate governments and rejected the doctrine of separation of powers, due to the fact that the work was written during the English Civil War. That was the reason why he demonstrated the necessity of a strong central authority to avoid the conflict and civil war. Any misuse of power that could happen by this authority must be accepted as the price of peace.

¹⁶ Steven Marx, *Moses and Machiavellism*, *The Journal of American Academy of Religion*, 1997

¹⁷ N. Machiavelli, *The Prince*, 1513

¹⁸ Bodin, *On Sovereignty*, *Cambridge Texts in Social and Political Thought*, 1992

According to Hobbes, people had formed societies to protect them from anarchy, because without society, people would live in state of nature where anyone can do anything he likes which inevitably leads to conflict. Civil society is therefore established by a social contract, in which each member of society gain civil rights but must be subjected to the civil law or political authority, a government. Sovereign power is not a party of the contract and not bound by it. Equally important to social contract theory was English philosopher John Locke whose ideas influenced Voltaire, Rousseau and many Scottish Enlightenment thinkers. John Locke has also been cited as a primary influence on the American and French Revolutions and 1776 American Declaration of Independence. He believed that human nature is characterized by reason and tolerance and that in a natural state all people were equal and everyone had a natural right to defend which was not enough, so people established a civil society to resume conflicts. Locke believed that revolution is not only a right but, under some circumstances, an obligation and advocated governmental separation of powers.

The religious wars that were waged during the 16th and 17th centuries were the milieu in which these theories of sovereignty were developed. The Treaty of Westphalia, which ended the thirty years of war in Europe and established the nation-state as the main actor in international law, was a legal confirmation of this principle. The important limitation of the sovereignty was the right of minorities within the sovereign state, to practice religion they choose.

In the 18th and 19th century the theory of sovereignty differed and the principle of non-intervention was developed. The sovereignty of the nation-state was not restricted by the reasons of humanity or justice and humanitarian intervention was not regarded as lawful. However, a limited right of intervention on humanitarian grounds was recognized by Vattel and some other scholars of the time.”If the prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested assistance.”¹⁹

According to Abiew, ”authorities on international law considered humanitarian intervention to be in conformity with natural law....the nineteenth century saw the ascendancy of legal positivism as the basis of international jurisprudence”

¹⁹ De Vattel, 2Le Droit Des Gens, 1863, Ch.IV, para.55, quoted in Supra note 8 at 36

By the end of nineteenth century, according to Brownlie, „the majority of publicists admitted that a right of humanitarian intervention....existed.“²⁰

The discussion above suggests that state sovereignty co-existed with the principle of unilateral humanitarian intervention since the establishment of the state system. In my opinion, the view that unilateral humanitarian intervention was widely accepted as legal under customary law before UN Charter is correct.

2.4 Theoretical approaches to the humanitarian intervention

According to Teson, there are three basic positions regarding humanitarian intervention: absolute noninterventionism, limited interventionism and broad interventionism.

2.4.1 Absolute noninterventionism

Absolute noninterventionists claim that the only justified use of force is the one against aggression, in self-defence. This position is adopted by most legal scholars. Among them is John Rawls, one of the most influential political philosopher of the 20th century, famous as the most prominent theorist of distributive justice. Rawls claims that principles of justice for national societies are those that would be chosen in the „original position“ (a hypothetical situation developed by Rawls to replace the state of nature from the classical social contract tradition) by free, rational parties. According to Rawls, two principles would be chosen: the principle of equal liberty and the „difference principle“. As liberty has priority over social and economic claims, Rawls calls this theory „justice as fairness.“ There is a considerable limitation on the applicability of this theory, that Rawls imposed. Rawls claims that civil and political human rights may sometimes be reduced or ignored, but only to limited extent, that is needed to achieve conditions that will make available the full enjoyment of those rights in the future.²¹ However, Rawls limited this theory of justice to the societies of democratic industrial West. According to Teson, this is the “relativist version of justice.”

Teson considered that this limitation has “important consequences for international human rights” and considered this theory unacceptable: “Variations in political, legal and

²⁰ I. Brownlie, *International Law and the Use of Force by States*, at 338, quoted in *Supra* note 8

²¹ See J. Rawls, *A Theory of Justice*, 1971

economic organization do not affect the universal validity of human rights derived from appropriate principles of critical morality.”²²

Rawls’s theory of international law relies in the analogy between state and individual. The representatives of states, from the international original position would choose “familiar principles”: the first is that of the equality of nations whose consequence is the principle of self-determination, so in a just international society nations are sovereign and hold the right of self-determination, which right is actually a rule of nonintervention.

2.4.2 Limited interventionism

Limited interventionists claim that humanitarian intervention is only acceptable in cases of extreme human rights breaches – genocide, mass murder or enslavement. This position is endorsed by most legal scholars who support humanitarian intervention. One of the most prominent contemporary political philosophers amongst them is Michael Walzer who was one of the developers of a pluralist approach to political and moral life. Amongst his contributions to the political theory are revitalizing the just war theory, the theory of “complex equality” and an argument that justice is primarily a moral standard within particular nations and societies and can not be developed in a universalized abstraction.

For Waltzer, only genocidal or equivalent action justifies intervention. According to Teson, “Walzer defines the state as ‘union of people and government’ and argues from there that foreign military intervention against governments is almost always wrong, even if its purpose or effect is to establish liberal or democratic institutions.”²³

Waltzer makes a distinction between domestic legitimacy which is singular in character and reflects democratic values of the citizens who have right to revolt against the dictators, and international legitimacy which is pluralist in character and reflects citizens’ recognition of “different patterns of cultural and political development”²⁴ According to Teson, Walzer’s principle of pluralism “indicates that there are local moralities (a Nicaraguan morality, a European morality, a Chinese morality) and not a system of moral political principles held valid for all persons regardless of geographical circumstances.we must let the political process work, we should not speed it up

²² Supra ,note 7 at 49

²³ Ibid. at 92

²⁴ See Walzer, *The Moral Standing of States* at 215-216

artificially....the outcome of the process may be a tyranny, but it is ‘their’ tyranny.”²⁵To Tesson, the pluralism of Walzer “does not differ significantly from outright moral relativism.”²⁶

2.4.3 Broad interventionism

Broad interventionism is the thesis that humanitarian intervention is acceptable in cases of serious human rights violations which need not to reach genocidal proportions. This view is defended by A.D’Amato and Reisman as legal scholars and Luban and Doppelt as philosophers.

In his work *Just War and Human Rights*, David Luban stands on position that a military intervention will be morally justified only if it maximizes the respect for human rights of everybody affected by the intervention.²⁷ For Luban, all just wars, including wars in self-defence, are human rights-based wars. Tesson argued : “Such a position, however, seems to be inconsistent with a theory based on individual rights. In most cases of forcible intervention, a nation going to the war for a prima facie just cause cannot avoid inflicting suffering and death.”²⁸

²⁵ Supra, note 22 at 33

²⁶ Ibid.

²⁷ See Luban, *Just War and Human Rights*, *Phil.&Public Aff.*160,1979

²⁸ Supra,note 22

3 Humanitarian intervention and the UN Charter

The initial site of any debate on the legality of the use of force in international law is article 2(4) of the UN Charter that provides:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the objectives of Purposes of the United Nations.”

Article 51 and Chapter VII of the UN Charter formally recognize certain particular exceptions to the rule stated above. Article 51 provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”

Chapter VII of the Charter also provides one clear exception to the non-intervention principle by granting powers to the Security Council to use force against any member state if the SC believes other measures, not involving the use of force, is not or would not be adequate in the maintenance or restoration of international peace and security.²⁹

Whether Article 2(4) of the Charter prohibits humanitarian intervention? Theorists are divided on the subject. The majority are of the view that humanitarian intervention is not legal under the UN Charter arguing that Article 2(4) cannot be interpreted in any way that will allow humanitarian intervention. Some even holds that the principle of non-intervention has raised to the status of *ius cogens* - a peremptory norm of general application for which no derogation is permitted.³⁰

Supporters of humanitarian intervention claim instead that it is legal under the Charter as one of the primary purposes of the Charter is the promotion of human rights.

There are three basic approaches to treaty interpretation: the first one, called “objective”, focuses on the actual text and analysis of the words used. The second one, “subjective”,

²⁹ See UN Charter, art. 42

³⁰ Shen Jianming, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, *Int'l Legal Theory* 1(2001)

looks to the intention of the parties adopting the agreement. The third approach regards the objects and the purpose of the treaty as the key to the meaning of a treaty provision.

In order to have true interpretation of a treaty provision all three approaches must be taken into account and it is impossible to exclude any of them: words employed, intentions or aims of the document.

Articles 31 to 33 of the Vienna Convention comprise aspects of all three doctrines.

According to Malcolm Shaw, “a joint “textual-intentions-teleological” approach is posited in the Convention on the Law of Treaties as the package solution to problems of resolving difficulties in understanding particular treaty provisions.”³¹

3.1 Textual arguments

Classicists conclude that the Charter prohibits the use of force for humanitarian purposes. According to them, there are only two exceptions to the prohibition of the use of force: an assertion of self defense or collective self defense and a Security Council authorization. The first exception permits the use of force in self-defense against armed attack and the second permits an action by the Security Council as an enforcement measure in the performance of its duty of maintaining or restoring world peace.³² In Article 2(4) in Historical Context, Gordon argues that if the framers of the Charter wanted to permit the use of force for humanitarian purposes they would have done so explicitly.

Classicists invoke two GA Resolutions. The first one is Resolution 2625 that provides that “no state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of another state.” The second one is GA Resolution 3314 from 1974 as a non-binding recommendation to the UN SC on the definition for the crime of aggression. Although not binding, this definition is often cited in opposition to military action. According to the Resolution, there is a distinction between aggression and war of aggression. Only war of aggression constitutes a crime against international peace. The GA defined “aggression” as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state...no justification of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”

³¹ M.Shaw,International Law, at 366 (1977)

³² See UN Charter, art.42

Classicists also claim that the right to self-defense is limited in the Charter and premise that claim on the fact that, according to the Charter, the state which has taken the action in self-defense, must inform the SC immediately. Once the SC takes measures, the right of self-defense becomes extinguished.

Considering all arguments mentioned above, classicists reached the conclusion that humanitarian intervention is clearly illegal under the UN Charter.

Unlike classicists, realists claim that Charter emphasizes the right of humanitarian intervention. Teson claims that the use of force is prohibited “a) when it impairs the territorial integrity of the target state; b) when it affects its political independence; or c) when it is otherwise against the purposes of the United Nations.”³³ First two tests are satisfied, because “a genuine humanitarian intervention does not result in territorial conquest or political subjugation.”³⁴ Regarding the last, “purpose” test, Teson concludes that humanitarian intervention is in accordance with one of the fundamental purposes of the UN Charter – the promotion of human rights.

Though both classicists and realists present credible arguments for their views, the classicists position is generally accepted. According to them, the mentioning of something means the exclusion of all that is not mentioned, thus the drafters could have specifically provided for humanitarian intervention. According to realists, if a provision can be interpreted reasonably without leaving any words redundant, that interpretation is preferable.

3.2 Intent arguments

Classicists argue that, in the event of a conflict between peace and justice, the two most important goals of the United Nations, the Charter chose peace.

“Any time that conflict or tension arises between two or more of these values, peace must always constitute the ultimate and prevailing factor.”³⁵

Lauterpacht, that advocates realist view, claim that the human rights provisions were adopted after an extensive discussion and that makes a legal duty for nations to respect

³³ F.Teson, Humanitarian Intervention, at 150 (2nd ed.1997)

³⁴ Ibid.

³⁵ A.Cassese, Ex Iniuria Ius Oritur : Are We Moving Towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community? 10 Eur.J.Int'l L.23,24(1999)

them. Regarding the debate about the formulation “promotion of human rights” that was eventually put in the Charter instead of “protection of human rights”, he insists that such an omission is of little practical importance:

“It would be out of keeping with the spirit of the Charter and, probably with the accepted canons of interpretation of treaties, to attach decisive importance to that omission (of the word “respect”). It would be otiose to the point of pedantry for the draftsmen of the Charter to incorporate an explicit provision of this nature in a document in which the principle of respect for and observance of human rights...is one of the main pillars or the structure of the Organization...”³⁶

It is clear that the drafters of the UN Charter had intention to stop both aggression and violations of human rights but not clear what was their intention regarding sacrificing one value for the other in case of conflict.

3.3 Policy arguments

According to Teson, “if literal analysis and intent do not yield a solution, the way to proceed is to examine article 2(4) in the light of subsequent state practice.”

“Supporters of humanitarian intervention claim that diplomatic practice has created an exception to article 2(4), or maintained a previously existing exception, legitimizing the use of force to remedy serious human rights deprivations. Critics claim that subsequent practice must be interpreted as forbidding humanitarian intervention.”³⁷

The failure of the collective security arrangements supports the thesis of the realists arguing that states are allowed to preserve their right to intervene unilaterally when it is necessary, because of the inability of the SC to perform its role effectively. According to Teson, “this is an application of the theory of *rebus sic stantibus* (fundamental change of circumstances).....the total inaction of the UN to remedy serious human rights violations.”³⁸ On the other hand, classicists claim that there is a possibility of abuse if unilateral humanitarian intervention is permitted and therefore it would be too dangerous to allow it.

³⁶ Lauterpacht, *International Law and Human Rights* 147 (1968)

³⁷ *Ibid.*

³⁸ *Supra*, note 22

In Corfu Channel Case, the ICJ declared that the action of the British Navy constituted a violation of Albanian sovereignty and that “the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.”³⁹ According to Teson, it is the example of rejection of the argument based on UN ineffectiveness by ICJ.

Realists argue that the Charter system never functioned as it was the intention of the drafters. It is the fact that SC can be paralyzed by using the veto power of the permanent members. There are many examples of the UN failure to intervene in cases of massive human rights abuses. In the case of no assistance from the UN, realists contend that measures of unilateral use of force are in the best interest of the world. It is difficult to give a constructive response to this argument.

3.4 Conclusion

Since the UN Charter is a treaty, the principles of treaty interpretation laid down in the Vienna Convention on the Law of Treaties, particularly Articles 31 and 32 are applicable, in order to ascertain whether humanitarian intervention is legal under the Charter.

According to Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the words of the treaty in their context, having regard to the object and purpose of the treaty.⁴⁰ The context for the purpose of interpreting a treaty shall comprise the text of the treaty, its preamble and annexes.⁴¹

If Article 2(4) of the UN Charter is read carefully, giving the words their ordinary meaning in their context and in the light of its purposes, the conclusion cannot be reached. Looking at the context of the Charter does not give answer to the question about legality of humanitarian intervention under it because both views on the interpretation of the Article 2(4) are acceptable.

The analysis of the UN Charter’s preamble also gives no solution. It is stated in preamble that the members are determined to “save succeeding generations from the scourge of war” but at the same time “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.

³⁹ Quoted in Supra, note 8 at 92

⁴⁰ See Vienna Convention on the Law of Treaties, art.31(1)(1969)

⁴¹ Ibid.

Due to the fact that, in order to maintain justice, force could be used, the two demands of the preamble are in direct conflict. One of them supports the legality of humanitarian intervention, the other does not. Of no help are also the object and purpose of the Charter because two opposing values, peace and justice are both purpose of the UN.

Article 32 of the Vienna Convention on the Law of Treaties provides that, in the case that the ordinary meaning of a provision in a treaty is ambiguous, recourse may be had to supplementary means of interpretation, including preparatory work of the treaty (travaux préparatoires) and the circumstances of its conclusion.

There is not enough documentary evidence about the subject of travaux préparatoires of the Charter, thus it cannot help in finding the true meaning of the Article 2(4) of the Charter. According to Teson, “there is a more general question whether the determination of original intent is feasible or relevant for our purposes. That international law should be interpreted today in the light of the 1945 intentions of the drafters of the Charter is a venturesome proposition.international treaties, especially organic ones such as the UN Charter, should be interpreted in accordance with present purposes and expectations in the international community. But even conceding the relevance of the inquiry into original intent, an examination of the travaux préparatoires does not answer the question whether the framers intended to maintain the customary exceptions to the use of force, including humanitarian intervention.”⁴²

It is difficult to conclude whether humanitarian intervention is legal or not under the UN Charter. Looking at particular treaties that preceded the UN Charter, like the Pact of the Arab League, leads to the conclusion that the use of force was prohibited: “recourse to force for the settlement of disputes arising between two or more member states of the League is prohibited.”⁴³ The 1947 Janeiro Treaty and 1948 Bogota Charter also prohibited the use of force, making reference to the UN Charter. A critical evaluation of the arguments of both classicists and realists indicates that the arguments of the former are more convincing. Considering that together with treaties mentioned, (in my opinion) the conclusion may be made that the UN Charter prohibits the unilateral use of force.

⁴² Supra note 7

⁴³ Quoted in I. Brownlie, *International Law and the Use of Force by States* at 116 (1963)

4 Humanitarian intervention under customary international law

4.1 Definition of a custom

It is common to distinguish the formal and the material sources of law. The formal sources are those legal procedures and methods for the creation of rules of general application which are legally binding. The material sources provide evidence of the existence of legally binding rules of general application. Formal sources do not exist in international law, but the principle that the general consent of states creates rules of general application, as a substitute. A statement of this principle is the definition of custom in international law.⁴⁴

In international law, it is not simple to discover where the law is to be found and whether a particular proposition amounts to a legal rule, due to the lack of a legislature and a proper system of courts with compulsory jurisdiction to interpret and extend the law. However, international law does exist and can be determined.⁴⁵

Statute of the International Court of Justice in Article 38.1(b) enumerates the sources of international law. It is widely recognized as the most authoritative statement as to the sources. The second source of international law listed in the Statute of ICJ is “international custom, as evidence of a general practice accepted as law.” Custom is constituted by two elements, the objective one of “a general practice” and subjective one “accepted as law”, the so-called *opinio iuris*. The main evidence of customary law is to be found in the actual practice of states.⁴⁶

“In the case of custom, States, when participating in the norm-setting process, do not act for the primary purpose of laying down international rules. Their primary concern is to safeguard some economic, social or political interests. The gradual birth of a new international rule is the side effect of States’ conduct in international relations.”⁴⁷

⁴⁴ See I. Brownlie, *Principles of Public International Law* at 2

⁴⁵ See *Supra* note 11

⁴⁶ See P. Malanczuk, *Akerhust’s Modern Introduction to International Law* at 39 (7th revised ed.)

⁴⁷ A. Cassese, *International Law* at 156 (2nd ed. 2005)

Custom is to be distinguished from other rules that states may follow without a feeling of legal obligation. Those are rules of courtesy, friendship or convenience. Thus, in order to exist a rule of customary international law, there must be a practice that is followed by the majority of states in belief that there is a rule of law that requires such practice.

4.2 Elements of custom

The two elements of customary rules of international law, state practice and *opinio juris*, “need not to be both present from the outset.” At the early stage, “practice may thus be regarded as being imposed by social or economic or political needs (*opinio necessitatis*). If it does not encounter strong and consistent opposition from other States but is increasingly accepted... a customary rule gradually crystallizes. At this later stage it may be held that the practice is dictated by international law (*opinio juris*)”⁴⁸

4.2.1 State practice

State practice includes any act, articulation or other behavior of a state that discloses the state’s conscious attitude with respect to its recognition of a rule of customary international law.⁴⁹

The International Law Commission in 1950 listed “Treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organizations” as forms of “Evidence of Customary International Law”.⁵⁰

According to Malanczuk, some of the evidences of customary law are published, like statements by government spokesmen made to the press, at international conferences and meetings of international organizations, but the vast majority of the material is not, like correspondence with other states and the advice which each state receives from its own legal advisers.

In the writings of international lawyers and judgments of national and international tribunals, which are mentioned in Article 38(1)(d) of the Statute of the International Court of Justice, sometimes evidence of customary law may also be found. Similarly, treaties can be evidence of customary law. If the treaty claims to be declaratory of customary law, or

⁴⁸ Ibid.

⁴⁹ Mark Villiger, *Customary International Law and Treaties*, at 4 (1985)

⁵⁰ See *Yearbook of the International Law Commission* II 368 ff. (1950)

intended to codify customary law, it can be quoted as evidence of customary law even against a state which is not a party to the treaty.⁵¹

The evident state practice is also important in the formation of custom. In the *Continental Shelf Case (Lybia v. Malta)*, the ICJ stated: “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of states even though multilateral conventions may have an important role to play in defining and recording rules, deriving from custom or indeed in developing them.”

According to Brownlie, if the consistency and generality of state practice are proved, no particular duration is required. A long practice is not necessary. Complete uniformity is also not required, but substantial uniformity is. The leading pronouncements by the ICJ are to be found in the judgment in the *Asylum case*:

The party which relies on a custom...must prove that this custom is established in such a manner that it has become binding on the other party...that the rule invoked...is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom ‘as evidence of a general practice accepted as law.’⁵²

According to Malanczuk, as noted by the ICJ in the *Fisheries case*, minor inconsistencies – a small amount of practice which goes against the rule in question, do not prevent the creation of a customary rule if it is supported by a large amount of practice. On the other hand, where there is no practice against an alleged rule, a small amount of practice is sufficient to create a customary rule. General practice should include the conduct of all states, which can participate in the formulation of the rule or the interests of which are specially affected.⁵³

After NATO intervention on Kosovo, some writers, like O’Connell, claim that even a single act may lead to the establishment of a rule of customary law if it is accompanied by a widespread support for the action.⁵⁴

⁵¹ See P.Malanczuk, *Akerhust’s Modern Introduction to International Law* (7th ed.)

⁵² See I.Brownlie, *Principles of Public International Law*, fifth ed. at 5,6

⁵³ *Ibid.*

⁵⁴ See M.E.O’Connell, *The UN, NATO and International Law after Kosovo*, 22, *Hum.Rts.Q.* 57, 82 (2000)

In the North Sea Continental Shelf, ICJ clarified that customary law may emerge even within a relatively short passage of time. According to Malanczuk, „the possibility of 'instant' customary international law, or 'droit spontane', based upon opinio iuris only and without the requirement of any practice, however, has remained a matter of dispute....the very notion of 'custom' implies some time element and 'instant custom' is a contradiction in terms...” Malanczuk claims that the view is confirmed in the North Sea Continental Shelf cases where ICJ carefully balanced the reduction of the time-element with a stronger emphasis on the scope and nature of state practice:

... Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ... an indispensable requirement would be that within the period in question, short though it might be, State practice ... should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.⁵⁵

4.2.2 Opinio juris

In the formation of customary law, there is a psychological element (*opinio juris sive necessitatis*) ,usually defined as a conviction felt by states that a certain form of conduct is required by international law. But, in international law, besides the rules imposing a duty there are also permissive rules, which permit states to act in a particular way without making such actions obligatory (for example, to prosecute foreigners for crimes committed within the prosecuting state's territory). In the case of permissive rule, *opinio juris* means a conviction that a certain form of conduct is permitted by international law, while traditional definition of *opinio juris* is correct in the case of a rule imposing a duty. Permissive rules can be proved by showing that some states have acted in a particular way and that other states that was affected by such acts have not protested.⁵⁶

The difference between permissive and rules imposing duties can be seen in Lotus case in 1927 where the Permanent Court of Justice rejected the claim of France that the absence of previous criminal prosecutions by flag states of a victim of a collision on the High Seas became a legal custom. The Court held that: „only if such abstention were based on their (the states) being conscious of a duty to abstain would it be possible to speak of an international custom.“

⁵⁵ See Supra note 51 at 39-47

⁵⁶ See Ibid. at 44

In the North Sea Continental Shelf cases in 1969, the International Court of Justice had a similar approach. The Court held that, although the principle of equidistance was employed in the delimitation of the continental shelf cases between bordering states, there was no evidence to ascertain that...they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary international law obliging them to do so – especially considering that they might have been motivated by other factors.⁵⁷

It is difficult to pinpoint when the transformation of opinion necessitates to opinio juris took place, to make a practice a rule of law. The party alleging the existence of custom must prove its existence in order the other party be bound by the rule. For the formation and existence of rules of customary international law, both the practice and the opinio juris must exist simultaneously. In the Case of Nicaragua v. United States (Merits), the ICJ noted as follows:

In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the opinio juris sive necessitates. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis’⁵⁸

From all discussed above, it can be concluded that the rule of customary international law that would permit unilateral humanitarian intervention is not yet fully crystalized.

⁵⁷ ICJ Report 44-5 (1969)

⁵⁸ ICJ Report 14 (1986)

5 Humanitarian intervention: state practice

The main purposes of humanitarian intervention are the prevention of genocide and other mass murder of civilian populations by their own state, reducing of massive human rights abuses and maintaining regional and global security and stability. In the case of genocide or any other massive human rights abuses, the security of whole region is threatened and the result of that are refugees fleeing their home country searching for safety.

In this chapter I will give a note on pre-Charter practice and analyse several humanitarian interventions that have been undertaken in the post-Charter era(1945-1989) , such as The East Pakistan (Bangladesh) Intervention of 1971, Vietnam's intervention in Cambodia of 1978 and The Tanzanian Intervention in Uganda of 1979 and cases of Northern Iraq, Somalia, Rwanda, Bosnia and Kosovo that occurred in post-Cold War era.

5.1 Pre-Charter practice

According to Abiew, one of the earliest known instances of interventions on humanitarian grounds occurred in 480 B.C. when the Prince of Syracuse demanded from Carthaginians to refrain from the uncivilized custom of sacrificing their children to Saturn. He made that demand as one of the conditions of peace. Treaty of Augsburg from 1555 that ended the religious struggle between Catholics and Protestants established the rule "Cuius regio, eius religio" that allowed German princes to select the religion within the domains they controlled, but provided peaceful life for Protestant or Catholic minorities.

The 1648 Peace of Westphalia is the most significant document of this period regarding protection of minorities. In order to end the war that lasted nearly three decades and to establish peace and order in Europe, this treaty established the supremacy of the sovereign authority within a system of independent and equal states but at the same time recognized some rights for both Protestants and Catholics."...the Empire was obliged not to pass any legislation which would discriminate as between Catholics and Protestants."⁵⁹

States intervened for humanitarian purposes during the 19th and 20th century, either collectively or unilaterally. The first example occurred in 1827 and was connected with a

⁵⁹ Quoted in Supra note 8 at 46

conflict between Turkey and Greece, in which Great Britain, France and Russia took military action to protect Christians. In 1860, France employed its troops to stop the massacre of thousands of Christians in Syria. In 1877 Russia declared a war against Turkey because of cruel treatment of Christians in Bosnia, Herzegovina and Bulgaria. The Congress of the United States declared the right to intervene in 1898 and sent armed force to assist the Cuban rebels against Spanish domination. Bulgaria, Greece and Serbia intervened to protect Macedonian Christians from Ottomans in 1913. The intervention of Woodrow Wilson in Mexico in 1914 was also provoked by humanitarian apprehensions.

According to Teson, "the most important pre-Charter precedent for humanitarian intervention, however, is the Second World War itself. That war, the paradigm of a just war, was without any doubt a humanitarian effort."⁶⁰

Teson considers that "the pre -1945 precedents are reaffirmed by post Charter practice" and that "a right of humanitarian intervention has been established since 1945, independently of what was the customary law prior to the United Nations Charter."⁶¹

The doctrinal writings of international scholars documented the legality of humanitarian intervention in cases of large-scale deprivations or flagrant violations of human rights. In addition, many cases of intervention justified by humanitarian grounds during the nineteenth and early twentieth century, constituted enough evidence of state practice to permit recognition of the right of humanitarian intervention.

5.2 Humanitarian interventions in Post-Charter era (1945-1989)

5.2.1 The East Pakistan intervention of 1971

Independent states of Pakistan and India were created in 1947 after the partition of British India Empire. The province of Bengal was split into two separate entities of West Bengal, belonging to India and East Bengal, belonging to Pakistan. In 1955 East Bengal was renamed East Pakistan and after the Bangladesh Liberation War of 1971, became independent nation of Bangladesh.

West Pakistan dominated politically and exploited the East economically. The political rights of the Bengali majority were discouraged by the very small percentage of East

⁶⁰ Supra note 7 at 158

⁶¹ Ibid.

Pakistani representation in central government. The East Pakistanis spoke Bengalese and considered themselves closer to Hindu civilization.⁶²

The uprising of Bengali people of East Pakistan for independence from Pakistan was the cause of launching military operation of the West Pakistani army. The war broke up on 26 March 1971 in which genocidal action lasted for several months, killing of unarmed Bengali and Hindu civilians, burning their homes and property. In order to fight the West Pakistan army, the guerilla groups and forces termed as the “Freedom Fighters”- Mukti Bahin (Bangladesh Liberation Army) were formed. India opened its border to allow Bangladeshi refugees safe shelter in refugee camps.⁶³

India supported the rebellion which led to Indo-Pakistani War of 1971. India intervened in order to curtail cases of mass murders and other human rights atrocities committed by the Pakistani army that caused the death of at least one million people and influx of over then million refugees to India. The huge number of refugees and no international action to the crimes against humanity made India to surrender the Pakistany Army in war that lasted 12 days. After Pakistan’s surrender to India-Bangladesh Joint Forces on 16 December 1971, people in Bangladesh celebrated the liberation.⁶⁴

India claimed it was the lawful exercise of the right of self-defence and that the action was necessary for the protection of Bengalis from gross violations of human rights by the Pakistani army and was supported by Soviet Union and other Eastern bloc states, while Pakistan, China and the USA accused India of aggression and argued it had no right to intervene. In the General Assembly, most delegates considered the situation in Pakistan as internal one asserting that India had to respect the sovereignty and territorial integrity of Pakistan.

The Indian action can be justified on two grounds. First, Pakistan launched preemptive air strike, which was an act of aggression and India acted in self-defence. The second ground is that action was based on humanitarian reasons. According to Teson, Indian action was legal because it was assistance to a people struggling for their right to self determination and because its objective was ending of genocide. Many commentators, like Fonteyne, consider this intervention “the clearest case of forceful individual humanitarian

⁶² See L.Hayes, Politics in Pakistan: The Struggle for Legitimacy, Boulder, Colorado: Westview Press (1984)

⁶³ Ibid.

⁶⁴ See H.Feldman, The End and the Beginning: Pakistan, 1969-1972, London: OUP (1972)

intervention". Some commentators consider it unlawful, claiming that India was politically interested in the secession of East Pakistan.

United Nations demonstrated inability to deal with the situation during the period of massacres. In spite of the fact that, obviously, it was the matter of international interest to stop the massacres, no action was taken. The Security Council did not condemn the Indian intervention, despite its self-interested nature, because it achieved the task of protecting human rights.

5.2.2 Vietnam's intervention in Cambodia of 1978

Cambodia is a over 14 million people country in South East Asia, a successor state of the Buddhist Khmer Empire. It was a protectorate of France from 1863 to 1954 as part of the French colony of Indochina. Cambodia gained independence from France on November 9, 1954 and became a constitutional monarchy under King Norodom Sihanouk. His regime attempted to keep its neutrality during the Vietnam War, but in early 1970, Lon Nol forces overthrew Sihanouk's regime. As a consequence, a civil war between the Khmer republican forces supported by USA and Khmer Rouge communists supported by North Vietnam and China, began.⁶⁵

The new regime renamed the country Kampuchea and started the process of reorganization in which massive violations of human rights occurred. In a period of three years, over 2 million people were reported dead but despite it was considered as a genocide by the international community, no effective measures were taken to stop it. In December 1978, Kampuchea was invaded by the Vietnamese troops and the Kampuchean United Front for National Salvation. The Pol Pot regime was deposed and the new government, supported by Vietnam, was established.⁶⁶

The official position of Vietnam in the UN SC debate after the intervention was that there was two separate conflicts: the one between Vietnam and Kampuchea and civil war in Kampuchea as the other. Vietnam claimed that it used force after Kampuchean aggression, in self-defence and that it undertook military action against Cambodia because of the inhuman conditions to which Pol Pot's government subjected the citizens of Kampuchea. The Vietnam's position was supported in SC by the Soviet Union, Cuba, and some other

⁶⁵ See D.Chandler, *The Land and People of Cambodia*, New York:HarperCollins (1991)

⁶⁶ See D.Chandler, *The Tragedy of Cambodian History:Politics,War and Revolution Since 1945*,Yale University Press (1993)

communist countries, but China, as a supporter of the Khmer Rouge, declared that Vietnam had committed aggression against Kampuchea. The Non-Aligned countries also held Vietnam responsible for violating the integrity of Kampuchea's territory. Some Western States also condemned the action.

The Security Council was unable to adopt any resolution unlike General Assembly that adopted a number of them calling for the withdrawal of foreign forces from that country.

“On the whole, it seems to be the case that international reaction to this case was shaped by the bitter Cold War rivalries rather than any concern for human rights atrocities prevalent before the Vietnamese intervention.”⁶⁷

According to Abiew, it has been observed that Vietnam had other motives. “It harboured territorial ambitions over Kampuchea and seized the opportunity, given the situation, to invade Kampuchea and install a puppet government....The danger here....is that while interventions may relieve the immediate reign of terror or the persecution of a particular group, they can also end up in the substitution of one oppressor by another.”⁶⁸

According to Leifer, “intervention was governed by strategic priorities and the international responses to that intervention by the corresponding priorities of interested parties.”⁶⁹ Kampuchean case was “a perfect candidate for humanitarian intervention”.⁷⁰

As Abiew comments, “the failure of the international community, including the UN, to find a diplomatic solution or to take any concrete measures of response, left the Vietnamese course of action as the viable option and the immediate solution to end the atrocities that were being committed.”⁷¹

5.2.3 The Tanzanian intervention in Uganda of 1979

President Idi Amin's brutal tyranny came to an end in April 1979 when he was overthrown by Ugandan rebels helped by Tanzanian army units. Between Tanzania and Uganda there has been a series of border clashes and in October 1978 Ugandan troops occupied 710 square miles of Tanzanian territory after what Amin declared annexation of it. This

⁶⁷ Supra note 8 at 129

⁶⁸ Ibid. at 130

⁶⁹ Leifer, Vietnam's intervention in Kampuchea "The Right of State v. The Right of People in Forbes & Hoffman eds. Note 6 at 145

⁷⁰ Ibid.

⁷¹ Supra note 8 at 131

aggression was not condemned by the Organization of African Unity, but Uganda was urged to withdraw its forces. It occurred after 15 days, but harassment of the Tanzanians along the border continued. By February 1979 the Tanzanian army invaded Uganda ended Amin's regime and a new provisional government under Yusuf Lule was formed.⁷²

Tanzania grounded its intervention as a reaction to the aggression against it. After the capture of Kampala, Tanzania declared its limited objective and invoked humanitarian considerations as one of its objectives. The USA supported Tanzania from the beginning, although on grounds of self-defence. United Kingdom, Zambia, Ethiopia, Angola, Botswana, Gambia and Mozambique also supported it strongly and Rwanda, Malawi, Canada and Australia quickly recognized new government. Only Sudan and Nigeria condemned the action considering it interfering in internal affairs of Uganda.

Alleged justification for the Tanzanian intervention is self-defense. But many scholars argued that it was doubtful, because Tanzanian invasion was not necessary and proportional since its army stayed in Uganda for months after the overthrow of Amin. Most of commentators concluded that it was justified on humanitarian grounds. The intervention in effect ended the human rights violations and brutal regime of Idi Amin, without annexing Uganda territory and spreading any political influence over it.

These examples of state practice demonstrate the belief of states they have right of unilateral humanitarian intervention that is grounded both from the Charter and customary law. The rule that human rights are a matter of international concern and that use of force is not prohibited in international law if used in order to remedy the most serious human rights violations, that is articulated, is the source from which *opinio juris* derives. But, as Wolf remarks, there is no consensus on the validity of such actions:

“abstract declarations from...the General Assembly condemning intervention in the broadest terms should not be taken as persuasive evidence of *opinio juris*...The inconsistency between nations' theoretical statements on the prohibition on the use of force and their actual, real world responses to such use of force is manifest...In the final analysis, the conviction of most states and scholars who oppose humanitarian intervention is of questionable strength. When states are confronted with real-world instances of intervention to prevent mass slaughter which do not implicate intense global

⁷² See S.R.Karugire, *A Political History of Uganda*, Exeter, New Hampshire: Heinemann Educational Books(1980)

rivalries,...they will not condemn them. And when scholars who support an absolute interpretation of the prohibition on the use of force are challenged with the moral imperative of terminating genocide, they will go no further than to label armed intervention as a meaningless ‘technical’ breach of law. In light of such de facto approval by scholars and states of every ideological tendency, an argument rejecting the legality of humanitarian intervention based on opinion juris is unpersuasive.”⁷³

The UN Charter do not find the customary institution of humanitarian intervention inconsistent with the purposes of UN in the event of failure of collective action under the Charter. Analysis of state practice of this period that was made above, demonstrates that states consider that the right of unilateral humanitarian intervention is available option both under the Charter and customary international law.

During the Cold War period, humanitarian values were obedient to geopolitical considerations and the doctrine of humanitarian intervention did not enjoy wide support in state practice, but there was a silent consent of the vast majority of states to it.

5.3 The practice of humanitarian interventions in the post Cold –War era

The disintegration of the Soviet Union and the end of the Cold War changed the international system regarding behavior of states and international institutions. International legal order was restructured and new world order, based on the rule of law was promised.

“the conclusion of the Cold War likewise presented a once-in-a lifetime opportunity for the nations of the world, acting individually, collectively and through the UN, to help achieve the two principal purposes of the UN: the maintenance of international peace and security and the promotion and encouragement of human rights and fundamental freedoms.”⁷⁴

The necessity of multilateral cooperation in dealing with international peace and security was widely accepted and the use of multilateral intervention became one of the

⁷³ Wolf, Humanitarian Intervention, Michigan Yearbook on International Legal Studies, Annual, 1988, note 199 at 358-9 quoted in Supra note 8

⁷⁴ Lillich, The role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN humanitarian intervention in the Post-Cold War World (1994) 3 Tulane Journal of International and Comparative Law 1 at 2 quoted in Supra note 8

mechanisms employed by the international community in dealing with crisis. Even some countries of the third world, the traditional guardians of the principle of sovereignty, changed their attitudes. The fact that new era has begun, in which governments can no longer hide behind state sovereignty and violate the human rights of their citizens, was widely accepted.

The UN General Assembly adopted resolution aimed at intensification of the coordination of the UN's humanitarian assistance in emergencies, as well as forcing non-consensual governments to permit aid to people in need during civil wars and other internal conflicts, in December 1991. The Security Council established larger and more complex UN peacekeeping missions and in 1992 the UN Department of Peacekeeping Operations was created. It is obvious that the UN has begun to take seriously human rights violations that constitute threats to international peace and security.

5.3.1 Northern Iraq

The Kurdish population, that is estimated to be about 20 million are divided among four states of the Middle East region. The denial of their right to self-determination has been the part of policy of Arab colonial domination. The 1923 Treaty of Lausanne ignored the claims of the Kurds and divided Kurdish territory between Iraq and Iran. It was the cause of Kurds' continuous revolt against the rule of Baghdad and during the period from 1961 to 1971 they were engaged in armed rebellion.⁷⁵ In spite of the agreement of some measure of autonomy, the Iraqi government began "Arabization" program which meant the repression and deportations of Kurdish people. The Kurdish rebellion from 1980 was brutally crushed. From 1985, under Saddam Hussein's regime, a systematic program against the Kurdish was performed, including using of poison gas.⁷⁶

The consequences of the Gulf War in 1991 were again atrocities of Iraqi Kurds and exodus of over 1.5 million refugees into Turkey and Iran. The Allied powers policy of non-intervention had to be reconsidered because the Iraqi mistreatment of its Kurdish population started to threaten international peace and security in the region and provided the legal basis for the action of Security Council. As the result of that action, the SC Resolution 688 was adopted. It condemned Iraqi's repression and demanded immediate

⁷⁵ See D. Mc Dowall, *A Modern History of Kurds*, London and New York, I.B. Tauris, (1996)

⁷⁶ *Ibid.*

end of it and allowing access by international humanitarian organizations. The legitimacy of this Resolution was debated, with pro and contra opinions of certain states.⁷⁷

In “Operation Provide Comfort” , to protect the Kurds , troops from several countries were employed (United States, Britain, France and other). These countries considered Resolution 688 as the ground for their action.

The UN action in Northern Iraq was the subject of the sovereignty debate. The conclusion of the debate was that “sovereignty and nonintervention could no longer shield genocidal and other repressive acts which are themselves forbidden by international law and treaties.”⁷⁸

According to Abiew, “some writers have noted the improbability of the birth of a new order, or caution against arriving at the conclusion that the case of the Iraqi Kurds sets clear precedent for humanitarian intervention. ”Regarding the allied action , Abiew concludes that “the allied action in Northern Iraq, for some, is neither reassuring as humanitarian intervention, nor does it signify the emergence of a new legal norm. It reinforces increasing fears that the global order that is being structured is maintained by a self-appointed cop whose actions are post-facto legitimized by the UN.”

5.3.2 Somalia

Somalia, whose population is split up into many clans, a country located in a Horn of Africa, is one of the few homogenous African states with a common language and culture and a single religion, Islam, so the fact that civil strife occurred in it is confusing for some commentators. It became a fully independent republic in 1960 through a merger of the two former colonial territories, British and Italian Somaliland. After the assassination of the president Shermarke in 1969 the army seized power under Siad Barre, who suspended the 1960 constitution and formed a military government. Barre’s regime was unmitigated and lasted 22 years, during which period he established personality cult. The internal factor that caused the Somalian tragedy was a lack of skills of the Barre’s government to cope with interclan rivalries and with worsening economic situation.⁷⁹ During the Cold War, both superpowers considered their military presence in Somalia very important, and as the result

⁷⁷ Ibid.

⁷⁸ See Supra note 8

⁷⁹ See C.Boulder, A Modern History of Somaila: Nation and State in the Horn of Africa, Westview Press (1988)

of their rivalry in the 1970s and 1980s, Somalia got considerable economic and military aid. With the end of Cold War United States and former Soviet Union withdrew their presence and their influence in Somalia was diminished. The military dictatorship and the regime of Siad Barre were weakened, and the government became increasingly totalitarian and resistance movements sprang up across the country. Eventually the Somali Civil War started in 1988. The dictatorship of Siad Barre came to an end in 1991 and various political movements that opposed his regime could not agree on power-sharing. In the state of power vacuum, the state of chaos quickly spread throughout the whole country. Over 1.2 million Somalis were displaced by the summer of 1992 and almost half of the population, about 4.5 million people were threatened with severe malnutrition, of which 300,000 died.⁸⁰

Various humanitarian relief efforts failed due to extreme insecurity for UN agencies and NGOs in distributing relief assistance to the people in need. Given this situation, the Security Council adopted Resolution 733 on January 23, 1992. The aims of this Resolution were to increase humanitarian assistance and to facilitate the delivery of aid.

In April 1992 the United Nations Operations in Somalia (UNOSOM 1) was established with a mandate to restore peace and protect humanitarian relief operations. Due to the fact that the truce was largely ignored and that the situation was deteriorating, the SC adopted Resolution 794 on December 3, 1992. This Resolution determined that “all necessary means” will be employed to “create a secure environment” for the delivery of humanitarian assistance.⁸¹

In order to carry out this Resolution, the Unified Task Force (UNITAF) was established. It was United States led multinational force with the task to protect the delivery of food and other humanitarian aid. The operation was successful and in May 1993, US-led action was concluded and the responsibility passed over to the UN, which adopted Resolution 814 and established UNOSOM II allowing the use of force envisaged under Chapter VII. The responsibility of UNOSOM II were disarmament and reconciliation, restoration of stability, law and order in Somalia. This operation was not successful and the new Resolution 837 called for total disarmament. US forces under UN command carried out penalizing attacks in Mogadishu and suffered heavy casualties. The US and other countries

⁸⁰ Ibid.

⁸¹ See W. Clarke and J. Herbst, Learning from Somalia: The Lessons of Armed Humanitarian Intervention

begun disengaging. Negotiations that were encouraging by UN were without success. It led to restricting UN forces tasks under the new Resolution 897.

The general accepted opinion amongst commentators is that Operation Restore Hope and UNOSOM II failed, not so much in respect of provision of humanitarian relief, but failed in preventing the recurrence of anarchy and chaos.⁸²

The case of Somalia was the first “experiment” of the UN’s new policy of using chapter VII for humanitarian purposes. The moral legitimacy of the operation was not in doubt. Regarding legal implications, the legitimacy of the operation was not in doubt too. There was no reservations of states and SC had no difficulty in calling a Somalian humanitarian catastrophe a threat to international peace and security under Resolution 794. But, considering the fact that Somali society was accustomed to statelessness and was disintegrated, neither the USA and the UN could cope with it.

According to James Mayall , ”The wrong lessons were learned from Somalia because although all interventions in civil conflicts face comparably intractable problems, very few – Afghanistan and Kurdistan are two possible exceptions – are faced not merely with the corruption of central authority but by its total disappearance combined with powerful structural obstacles to its reconstruction. Failure in Somalia did not have to mean that any external intervention was bound to fail elsewhere in Africa, but that was how it was interpreted. If such interventions were doomed to fail, it was not because African conflicts have special characteristics that are general to them all, but as suggested earlier, because of contradictions in the concept of humanitarian intervention itself. It follows that replacing great power involvement by peace enforcement operations organized on a regional basis must be expected to face similar problems. The replacement may be politically expedient, but it does not represent a conceptual solution.”⁸³

5.3.3 Rwanda

The Republic of Rwanda is the country of Great Lakes Region of east-central Africa with the densest population in continental Africa of approximately 10.1 million people with the majority of Hutu and the minority of Tutsi. The ethnic tensions between them traces back to the Belgian colonial era where the Tutsi aristocracy and second class status of Hutus

⁸² Ibid.

⁸³ J.Mayall, Humanitarian Intervention and International Society: Lessons from Africa, in J.Welsh, Humanitarian Intervention and International Relations, at 120-141, OUP (2004)

were established by ruling Belgian authorities. In the first two decades following Rwanda's independence, tensions between Tutsi and nationalist Hutu burned up as the preface of the civil war and genocide of the 1990s.⁸⁴

Upon the independence from Belgium in 1962, the thousands of Tutsi minority lost their lives in violent clashes and tens of thousands sought refuge. In a military coup in 1973, Hutu politician Habyarimana seized power, establishing the National Revolutionary Movement for Development (MRND) and a one-party state in which the Tutsi were not involved in Rwandese politics. Collapsing economy and food shortages also contributed to the dangerous political climate.⁸⁵

In October 1990, the Rwandan Patriotic Front (RPF) formed of exiled Tutsis initiated a military offensive into Rwanda from Uganda. A civil conflict of low intensity was waged for next three years and RPF demanded the return of all refugees and a government of ethnic reconciliation. The international community protested human rights violations and the result was signing of the Arusha Accords in August 1993 between Habyarimana and RPF. Two days after the signing, the UN SC adopted Resolution 872 (1993) which established the UN Assistance Mission for Rwanda (UNAMIR) with the task to assist and supervise the implementation of the Arusha Accords.⁸⁶

On April 6, 1994 Habyarimana and the President of Burundi were killed in a plane crash caused by the firing of rockets at Kigali airport. The result of this assassination was almost one million Rwandans massacred, 1.3 million fled to neighbouring countries and further 2.2 million people internally displaced within four months in the most brutal and systematic slaughter of civilians ever witnessed on the African continent.

The 2,700 UNAMIR troops were powerless in stopping the massacres. After the brutally killing of Rwandan Prime Minister and her Belgian UN guards, Belgium withdrew its military contingent and SC passed the Resolution 912 on April 21, 1994 reducing the number of UNAMIR troops to 270. As the situation continued to deteriorate, the SC unanimously passed Resolution 918, increasing the number of UNAMIR troops to 5,500 and expanded the mandate to protection of displaced persons, refugees and civilians.

⁸⁴ See G. Prunier, *The Rwanda Crisis: History of a Genocide*, New York University Press (1995)

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

However, these troops were not deployed because the member states didn't provide the required number of them.

“Operation Turquoise” from June 22 by July 2, 1994, authorized by UN and unilaterally undertaken by France succeeded to set up a security zone in southwestern Rwanda. After the withdrawing, French forces handed over control of the security zone to the UN peacekeeping force composed primarily of African units.⁸⁷

France claimed that the nature of the operation was strictly humanitarian. The motives for the intervention has been questioned by some observers because of the French support to the Habyarimana government with troops and arms in its counter-offensives against the RPF in 1992 and 1993 and given France had significant political and economic interests in Rwanda. Nevertheless, Operation Turquoise served an important humanitarian purpose.⁸⁸

The case of Rwanda played a fundamental role in the evolution of the theory and practice of humanitarian intervention and peacekeeping. The SC interpreted the threat to the peace and security in a narrow way, and western key states denied that genocide had occurred in Rwanda. The UN had knowledge that genocide was being planned, but the international community took little or no action. One more reason for the slow response to Rwanda was the absence of USA geopolitical interests in the area and the absence of American involvement that was crucial in Iraq, Bosnia and Somalia. UN failed to take timely decisive action by putting a stop to massacres. The UN Secretary General admitted : ”we are all responsible for this disaster, not only the super-powers, but also the African countries, the non-governmental organizations, the entire international community. There has been a genocide and the world is talking about what it should do. It is a scandal.”⁸⁹

5.3.4 Conclusion

There is an insoluble theoretical problem: how to find a middle position between peacekeeping and enforcement. Peacekeeping requires the consent of the parties to the conflict and enforcement requires the attribution of responsibility to one side or the other. Natural disasters – famines, floods, earthquakes, etc require humanitarian response, while civil conflicts require political response. ”In many contemporary crises, where the state has collapsed, leading to the systematic abuse of basic rights and/or genocide, the realistic

⁸⁷ L.Melvorn, *A People Betrayed: The Role Of The West In Rwanda's Genocide*, ZED BOOKS LTD (2000)

⁸⁸ *Ibid.*

⁸⁹ Quoted in *Supra* note 8 at 197

choice is between allowing the conflict to run its course and intervening to establish a new political order from the ground up. There are perils whichever choice is made, but while the second choice seems to have been accepted, albeit reluctantly, in former Yugoslavia and East Timor, so far it has not been extended to Africa.”⁹⁰

5.4 Humanitarian intervention in the Balkans

5.4.1 Bosnia

The state of Balkan Peninsula, The Socialist Federal Republic of Yugoslavia (SFRY) consisted of six republics, namely Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Serbia, Macedonia and two autonomous regions – Kosovo and Vojvodina. Each republic and province had its own constitution, supreme court, parliament, president and prime minister. At the top of the Yugoslav government were the President (Tito), the federal Prime Minister and the federal Parliament.⁹¹

Marshal Tito was named President for Life of this multinational state. He was almost universally considered as the last great World War II leader, founder of “national communism” and first communist that resisted Stalin. Under his strong leadership, Yugoslavia’s historically antagonistic national groups were being held in a stable federation. Upon Tito’s death in 1980 the government structure was rearranged, by rotating the Presidency among the six republics. In the lack of a strict leader, the system of “brotherhood and unity” dissolved quickly. Ethnic tensions deteriorate and republics started to demand autonomy. Croatia and Slovenia proclaimed their sovereignty and independence from the SFRY on 25 June 1991. Two days later, the Federal Yugoslav Army (JNA) moved into Slovenia and parts of Croatia. The war in Slovenia lasted 10 days and the JNA withdrew, but conflict in Croatia intensified. Under pressure from Germany, UN granted recognition to Slovenia and Croatia on January 15, 1992.⁹²

Considering the multi-ethnic mixed population of Bosnia, under the climate of disintegration of the country, civil strife in Bosnia and Herzegovina was inevitable. The result of 1992 referendum was that majority favoured independence. The referendum was boycotted by Serbian population and its results rejected. Soon after the declaration of independence of Bosnian government on March 3, 1992 and the EC’s recognition of

⁹⁰ Ibid.

⁹¹ See I. Banac, *The National Question in Yugoslavia: Origins, History, Politics*, Ithaca, Cornell University Press

⁹² Ibid.

Bosnia and Herzegovina, the ethnic strife spread and massive human rights violations occurred in which all sides of the conflict were involved. The result of this practice were close to two million people displaced and hundreds of thousands killed.⁹³

The complexity of the Yugoslav crisis, many interlocutors to deal with, made the international community reluctant to intervene. Mediation by EC was the first way of its involving, but after attempt to restore peace and dialogue have failed, SC took some form of action to the request of many countries, including Yugoslavia. Resolution 713 on September 25, 1991 called “all states to refrain from any action which might contribute to increasing tension ” and implemented “complete embargo on all deliveries of weapons and military equipment to Yugoslavia”.

United Nations Protection Force (UNPROFOR) was established by the Resolution 743 from February 21,1992, to help consolidating the ceasefire and facilitating negotiations. Two more Resolutions followed: SC Resolution 752 that called for stop fighting both sides and Resolution 757 calling for economic sanctions against Serbia.

Acting under Chapter VII, SC adopted Resolution 770 on August 13, 1992 which further expanded the mandate of UNPROFOR to deliver humanitarian assistance using “all measures necessary”. “No-fly “zone over Bosnia was established under the Resolution 781 with no effect. SC, under Resolution 816 approved the enforcement by NATO fighter planes. A series of bombing campaigns against Bosnian Serb positions violated “safe havens”. In December 1995, parties started negotiations to end the war. The result was Dayton Agreement from November 1995 that ratified and strengthened existing territorial divisions and established NATO-led implementation Force for Bosnia (IFOR) with the task to oversee the implementation of the military part of the Peace Plan. Immediately after the Dayton Peace Agreement, in 1995 the High Representative for Bosnia and Herzegovina was created to oversee the civilian implementation of this agreement. His mandate is extended until June 30th 2008.⁹⁴

The goal of Dayton Agreement was the creation of unitary, multiethnic Bosnian state, a federal government representing all the people of Bosnia. But for several years after it,

⁹³ Ibid.

⁹⁴ See J.Stilhoff, Is Dayton Failing: Bosnia Four Years after the Peace Agreement, Journal of Ethnic and Migration Studies, Vol.27 (2001)

reintegration continued and nationalist political parties continued to dominate.⁹⁵ It was not surprising for some commentators like political scientist John Mearsheimer from the University of Chicago: “History records no instance where ethnic groups have agreed to share power in a democracy after a large – scale civil war... The democratic power-sharing that Dayton envisions has no precedent.” Due to the pressure of international community, Bosnia’s state reached political and economic reforms. After numerous delays, the Bosnian entities agreed on EU-driven police, defense and security reforms. Along with the other western Balkan states, Bosnia and Herzegovina seeks eventual full membership in the EU and NATO. The full integration of the region after satisfying required conditions, have been committed by both institutions.

UN involvement in the Former Yugoslavian conflict and defining by SC that it is a threat to international peace and security, could be justified on several grounds: the massive exodus of refugees, heavy loss of human lives, severe humanitarian situation with large segments of civilian population deprived of essential supplies and human rights violations perpetrated by all sides involved. The situation in the former Yugoslavia showed the Security Council’s preparedness to authorize the use of force for humanitarian reasons.

5.4.2 Kosovo

The Declaration of Independence of Kosovo from July 1990 and the referendum in 1991 to confirm the Declaration, were results of Kosovo Albanians long-standing claim for independence from Serbia on the basis on the right to self-determination. The parallel parliament representing the Ethnic Albanian population of Kosovo proclaimed secessionist state Republic of Kosova in 1991 that was only recognized by Albania. The creation of parallel structures in education, medical care and taxation and various forms of widespread civil disobedience were characteristics of Kosovo Albanians separatist movement.

During this period, The Kosova Liberation Army (KLA) was founded. In 1996 KLA carried a series of attacks against police stations, Serb government officials and Serb refugee centers in Kosovo. The US State Department in 1998 listed the KLA as a terrorist organization connected with international heroin trade and financing its operations with money from Islamic funds including loans from Osama Bin Laden, according to Interpol

⁹⁵ Ibid.

report.⁹⁶ “In 1998, the U.S. State Department listed the KLA as a terrorist organization, indicating that it was financing its operations with money from the international heroin trade and loans from Islamic countries and individuals, among them allegedly Usama bin Laden. Another link to bin Laden is the fact that the brother of a leader in an Egyptian Jihad organization and also a military commander of Usama bin Laden, was leading an elite KLA unit during the Kosovo conflict“ but the USA armed and trained KLA members in Albania sending them back in the summer of 1998 in order to destabilize Kosovo.⁹⁷

The number of Serbian security forces in the region was increased due to the fact that Serbian authorities claimed that KLA is a terrorist organization. The Serb forces launched an offensive against KLA that pulled back but reorganized its central command structure – divided Kosovo into seven military operational zones, built training camps and bases in Albania and even established its own military academy. By February 1998, the KLA had been removed from the US State Department’s terrorism list.

KLA attacks and Serbian reprisals continued and culminated with the Racak incident on January 15, 1999 in which 40 to 45 Kosovo Albanians were killed. The international community claimed that casualties were civilians while the government of the Federal Republic of Yugoslavia claimed they were all members of KLA. The incident was the turning point of the war. NATO issued a statement that was prepared to launch air strikes against Yugoslav targets. The Rambouillet talks began on February 6, 1999 with Javier Solana, NATO Secretary General negotiating with both sides. The accords called for NATO administration of Kosovo as an autonomous province within Yugoslavia, a force of 30,000 NATO troops on Yugoslav territory including Kosovo, right of passage for NATO troops and immunity for NATO and its agents to Yugoslav law. On 18 March 1999, the Albanian, American and British delegation signed the Rambouillet Accords while Serbian and Russian delegations refused. After the failure of Rambouillet, the international monitors from the OSCE withdrew on March 22, the next day the Serbian assembly accepted the principle of autonomy of Kosovo and non-military part of the agreement but

⁹⁶ Written Testimony of Ralf Mutschke Assistant Director, Criminal Intelligence Directorate International Criminal Police Organization – Interpol General Secretariat before a hearing of the Committee on the Judiciary Subcommittee on Crime (2000-12-13) The Threat Posed by the Convergence of Organized Crime, Drugs, Trafficking and Terrorism, US House Judiciary Committee, Retrieved on 2008-05-31

⁹⁷ J. Bisset, War on terrorism skipped the KLA, National Post <http://www.deltax.net/bisset/a-terrorism.htm>

not the military part which characterized as “NATO occupation”. NATO bombing began the following day, March 24 and ended on June 11, 1999.⁹⁸

Independent International Commission on Kosovo in „The Kosovo Report“ concluded that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic means had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.⁹⁹

The Commission claimed that NATO’s intervention clearly violated Article 2 (4) of UN Charter and did not meet the criteria necessary for exemption under Article 51, but amongst examiners there are opposite views –that the intervention was legal under international law. There are two main arguments for this. First, that NATO alliance had the authority under UNSC resolutions regarding Kosovo that was passed before the intervention and second that a broader conception of international law is needed in order to allow for the preservation of basic human rights.

In the process of reaching the conclusion about whether NATO alliance had authority to intervene in Kosovo, the first logical step is analysis of Articles 2(4), 2(7) and 51-53 of the UN Charter. Article 2(4) states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The most common interpretation of this article is that it clearly prohibits non – UNSC authorized intervention.

Article 2(7) states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII

⁹⁸ See T.Judah, Kosovo:War and Revenge, Yale University Press (2000)

⁹⁹ See Independent International Commission on Kosovo,The Kosovo Report that was presented to UN Secretary General Kofi Annan on October 23,2000, at <http://www.kosovocommission.org/reports>

This article have also been interpreted as a clear sign that intervention in the internal affairs of a recognized state is illegal.

Regarding Kosovo case, Articles 51, 52 and 53 in Chapter VII are the most relevant.

Article 51 states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

In the case of Kosovo, there was no threat or armed attack by the state of Yugoslavia upon any member states of NATO. In addition, Kosovo was not in a position to file a legal request for protection from NATO, being not considered a separate national identity. Further, even though Article 52 states that "Nothing in the present Charter precludes the existence of regional arrangements or agencies from dealing with such matters relating to the maintenance of international peace and security....", the ultimate authority of the UN SC is provided in Article 53: „no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.“ Due to the fact that NATO was not authorized by the UN SC, even it was acting to maintain peace, it clearly violated Article 53 of the UN Charter.

Despite these multiple violations of the Charter, some authors, like Mertus, tried to re-interpret the Article 2(4) claiming:

By its very terms, the Charter does not prohibit all threats or uses of force. Article 2(4) prohibits force against the “territorial integrity or political independence of any state....”As interpreted in the treaties and diplomatic history, “territorial integrity” refers not to the “territory of a state” but to the “integrity of the territory.” An essential condition of this integrity is the maintenance of certain standards of administration on the territory, including the protection of fundamental human rights norms.... Humanitarian intervention in such a case falls below the threshold set in Article 2(4) since the interveners do not seek to deprive the state of its integrity but, rather, to enhance it.¹⁰⁰

¹⁰⁰ Mertus 2000b,533

Her claim that the traditional interpretations of the limitation to intervene have significantly changed was not accepted by the Kosovo Commission.

Regarding the conclusion stated in Kosovo report, that intervention was not legal, but was legitimate, in my opinion, Kosovo case is one of the most interesting to analyse legitimacy in the light of the danger of abuse. NATO claimed that the targets of the bombing raids were strictly military. However, prolonged bombing destroyed communication towers, electricity power network, television broadcast facilities, bridges and other transportation infrastructure. Many of these targets were far away from the actual verification mission. The bombing caused huge economic loss for the FRY that affected the standard of living of their citizens and territorial integrity of the state. The fact is that FRY's ability to maintain peace and security within its own borders was seriously undermined. In addition, permanent armed presence in Kosovo region after the end of Kosovo war was a clear infringement upon the territorial integrity of the country.

“The morality of a particular intervention should be appraised in the light of whether or not, in that case, intervenors have in effect aimed their efforts at stopping human rights violations. If they have not, if they have abused, then the intervention is morally unjustified”¹⁰¹ According to Teson, one possible interpretation is that intervening state abuses when it does not aim its action to bring to an end human rights violations, and it is enough to turn intervention into aggression; but the alternative interpretation states that a necessary condition for the justification of humanitarian intervention is that the intervenors act out of purely humanitarian concerns.” A state acts abusively by this standard if it entertains a hidden agenda-if its principal motives are selfish.” Teson has nothing against the self-interested action if it does not impair the main humanitarian objective. Teson claims that humanitarian intervention is justified not because the motives of the intervenor are pure and quotes Walzer: “[but because] its various motives converge...on a single course of action that [is] also the course of action called for by [the victims of oppression]”

Considering the views of noninterventionist and supporters of the doctrine of humanitarian intervention regarding the question of abuse, it is obvious that their views about whether Kosovo intervention was legitimate and morally justified are different.

¹⁰¹ Supra note 7

The main problem in the Kosovo case was the fact that two permanent members of UNSC, Russia and China were firmly in the opposition of the use of force. As the crisis in Kosovo was getting worse, NATO resorted to the use of force despite the clear lack of UNSC authorization. In order to avoid this kind of situations in which the Security Council, because of lack of unanimity of the permanent members fails to exercise its responsibility for the maintenance of international peace and security, the International Commission on Intervention and State Sovereignty, in its report *The Responsibility to Protect* suggests seeking „support for military action from the General Assembly meeting in an Emergency Special Session under the established 'Uniting for Peace' procedures.“ (ICISS report 2001, 53)

The report further states that strong support from the General Assembly could result in changing the opinion of veto holders.

The practical difficulty in all of this is to contemplate the unlikelihood, in any but very exceptional case, of a two-thirds majority, as required under the Uniting for Peace procedure, being able to be put together in a political environment in which there has been either no majority on the Security Council or a veto imposed or threatened by one or more of the permanent members – although Kosovo and Rwanda might just conceivably have been such cases¹⁰²

Thus, military intervention approved of two-thirds of the General Assembly would still be illegal act, but legitimate, considering support of more than 120 nations.

Due to the fact that NATO lacked a two-thirds majority vote to intervene in Kosovo, it is difficult to claim that intervention was legitimate.

The Kosovo conflict, which culminated in an intensive NATO air campaign, has initiated international interest and attention regarding dilemma should armed humanitarian interventions be carried out without the UN's authorization. Supporters of the doctrine will encourage more Kosovo-like actions as a sign of changes in the customary international law, towards the idea that the world is moving towards realizing human rights as an integral component of international order, while the opponents will continue to view the world quite differently. The opinion that prevails in international law theory is that the doctrine of humanitarian intervention can only be legitimated when adequate proof of support by the international community has been obtained.

¹⁰² ICISS report 2001, 53

In my opinion, the best way to conclude the topic of Kosovo intervention is to quote the Kosovo report once again:

In conclusion, the NATO war was neither a success nor a failure; it was in fact both. It forced the Serbian government to withdraw its army and police from Kosovo and to sign an agreement closely modeled on the aborted Rambouillet accord. It stopped the systematic oppression of the Kosovar Albanians. However, the intervention failed to achieve its avowed aim of preventing massive ethnic cleansing. Milosevic remained in power. The Serbian people were the main losers. Kosovo was lost. Many Serbs fled or were expelled from the province. Serbia suffered considerable economic losses and destruction of civilian infrastructure. Independent media and NGOs were suppressed and the overall level of repression in Serbia increased.¹⁰³

Considering all cases mentioned, it can be concluded that post-Cold War practice suggests that states employ more extensive conception of humanitarian intervention. The recent cases show a growing support for humanitarian intervention and a significant change in the way in which states take action in respond to humanitarian crises. A notion of state sovereignty is re-defined and changed towards the view that states are responsible for the protection of human rights.

¹⁰³ Independent International Commission on Kosovo, Kosovo report, 2000

6 Humanitarian intervention after 11 September

The September 11 attacks, the first armed attacks on United States territory since the adoption of the UN Charter, put the „war on terror“ on a dominant place in the international security program. The official goals of the War on Terrorism, to prevent terrorist attacks, to respond to terrorist threats and to limit the power of terrorist organizations, were used to justify unilateral preemptive war. Critics argued that unilateral preemptive war can cause human rights abuses and other violations of international law.

The new foreign policy of United States, „The Bush Doctrine“, gives the right to the United States to treat countries that harbor or give aid to terrorist groups, as terrorists themselves. This policy was used to justify the 2001 invasion of Afghanistan which was the beginning of the War on Terror. It was launched by the United States and the United Kingdom in response to the September 11, 2001 attacks. The stated purpose of the invasion was to remove the Taliban regime as a supporter of al-Qaeda and to capture Osama bin Laden and destroy his terrorist organization. Many prisoner abuse cases and tortures were claimed as the result of this policy. There are no official figures of civilian deaths caused by the invasion, but some individual reports claim from 1,000 to 5,000 civilians as casualties.

The policy also included preventive war, that is considered an act of aggression in international law due to its speculative nature. Preventive war is initiated under the belief that future conflict is inevitable, though not imminent. Using the policy of preventive war, United States should depose foreign regimes that represented a threat to the United States security, even if that threat was not immediate. Advocates of preventive war claim that it is necessary in today's post September 11th world. United States also claim that the policy of preventive war is a policy of supporting democracy around the world and of readiness to pursue US military interests in a unilateral way. Critics of the Bush Doctrine are suspicious of this readiness claiming that it is contrary to the Just War Theory.¹⁰⁴

¹⁰⁴ See J.Record, The Bush Doctrine and the War with Iraq, Parameters, 2003

This policy was used to justify the 2003 invasion of Iraq that was led by United States backed by British forces and smaller contingents from other countries. The official reasons for the invasion were to “disarm Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism and to free the Iraqi people.”¹⁰⁵ Supporters of the invasion argued that Iraq’s leadership has continued the expansion of mass destruction weapons and that eliminating the leaders who might authorize new attacks on US territory was the purpose of invasion in order to preempt any danger.

The invasion was strongly opposed by France, Germany and some other allies of US, arguing that it was not justified in the context of the UNMOVIC’s report - the United Nations Monitoring, Verification and Inspection Commission that was formed to continue the mandat of UNSCOM to disarm Iraq of its weapons of mass destruction.

The invasion led to the collapse of the Iraq government and military in about three weeks. The majority of deaths and injuries have occurred after President Bush declared the end of „major combat operations“ on May 1, 2003. Estimates on the number of people killed in the invasion and occupation of Iraq are highly disputed. Approximately 7,500 civilians were killed during the invasion and more than 60,000 after, while according to Iraq’s Health Minister, between 100,000 and 150,000 Iraqis have been killed.

It is obvious that the Bush doctrine provides a new definition for the use of US power. It has three primary objectives: combat and defeat terrorism, good relations with other great powers – Russia, China and India that are no longer defined as „strategic adversaries“ and encouraging around the world a model for national success that is stated in National Security Strategy (NSS) – freedom, democracy and free enterprise.

The doctrine is contradictory. It proclaims freedom and, at the same time, closer relations with nations that suppress freedoms – China, Russia, etc. Nevertheless, at the heart of this doctrine is intention to create a new balance of power in the world, by integrating Russia and China into the West in order to reduce threat of significant great power conflict. But, tensions between US and the great powers such as the future of Taiwan, non – proliferation and China’s nuclear capability and tensions with Russia due to its relations with the „axis of evil countries“ and arguable loyalty to free-market democracy, still remain.

¹⁰⁵ The radio address of President Bush
<http://www.whitehouse.gov/news/releases/2003/03/20030322.html>

Further, the doctrine is based on a conception of “preemptive self-defence“ – the use of force “even where there is no reason to believe that an attack is planned and where no prior attack has occurred...it is to be distinguished from ‘anticipatory’ self-defence [that is] a narrower doctrine that would authorize armed responses to attacks that are on the brink of launch, or where an enemy attack has already occurred and the victim learns more attacks are planned“¹⁰⁶.

It is clear that a conception of preemptive self – defence is unlawful under international law due to the legal prohibition on the use of force enshrined in Article 2 (4) of the UN Charter, a binding treaty to the all state members. According to O’Connell, „the SC action after September 11 can be cited to support anticipatory self-defence in cases where an armed attack has occurred and convincing evidence exists that more attacks are planned...in other words, a state may not take military action against another state when an attack is only a hypothetical possibility, and not yet in progress – even in the case of weapons of mass destruction.“¹⁰⁷ Mere possession of weapons of mass destruction without even a threat of use does not amount to an unlawful armed attack.

The US use of force in Afghanistan can be justified on the basis on the right to self-defence considering the serious of coordinated attacks of September 11 that were mounted from Afghan territory. Many authors consider that without the removal of the Taliban regimes the US would not be able to defend itself against Al Qaeda.¹⁰⁸ Nevertheless, according to the current international order, the US has no right to invade another state on the basis of speculative concerns about its possible actions that can happen in the future. In order to uphold the rule of law in the world, the US can not have special status and the right on preemptive self-defence.¹⁰⁹

Regarding the new doctrine of some states that argue they have the right to use force preemptively, to act unilaterally or in ad hoc coalitions, without agreement in the Security Council, UN Secretary General expressed concern that “if it were to be adopted, it could

¹⁰⁶ See The Myth of Preemptive Self-Defence, M.O’Connell, The American Society of International Law, 2002 at 2

¹⁰⁷ Ibid.

¹⁰⁸ N.Quenivet, The World after September 11: Has it Really Changed?, The European Journal of International Law, Vol.16 no.3, 2005

¹⁰⁹ Ibid.

set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification.”¹¹⁰

It is important “to reaffirm faith in fundamental human rights, to reestablish the basic conditions for justice and the rule of law...The world may have changed,[...],but those aims are as valid and urgent as ever.”¹¹¹

¹¹⁰ Secretary General’s address to the General Assembly, New York, 23 September, 2003

¹¹¹ Ibid.

7 Concluding remarks

This thesis has attempted to reach the conclusion whether humanitarian intervention is legal and legitimate, through an examination of the evolution of the doctrine and its practice.

Although it is difficult to conclude whether humanitarian intervention is legal or not under the UN Charter, critical evaluation of the arguments of both supporters and opponents has led to the conclusion that unilateral use of force is prohibited under the UN Charter. On the other hand, in spite of the fact that sovereignty is the foundation of interstate relations, it cannot be the excuse for avoiding responsibility of states to protect persons and property within their territories. The doctrine of humanitarian intervention is morally necessary in today's world, but due to the danger of abuse and impartiality of those intervening, it must be properly regulated. The UN must establish criterion that must be met before humanitarian intervention can be undertaken.

The new events in post-September 11 world challenged a consensus of global solidarity and collective security articulated in 2000 Millennium Declaration. The new doctrine emerged - some states argue they have right to use force pre-emptively, to act unilaterally or in ad hoc coalitions, without agreement in the UN Security Council. UN must confront new forms of terrorism and proliferation of weapons of mass destruction and at the same time confront proliferation of the unilateral and lawless use of force. To achieve both aims, it is not enough to condemn unilateralism but structural changes must be made in order to make the major organs of United Nations more powerful and efficient.

In my opinion, there are several conditions that must be met in order to ensure that the doctrine is not abused: the UN SC should be notified by the state planning humanitarian intervention; only if SC fails to act within reasonable time, states could intervene unilaterally; violations of human rights must be serious; states should have been employed all possible measures short of use of force first – only if those measures are proved inadequate and unsatisfactory, the force can be employed; the intervention must end as soon as the violations of human rights has been eliminated.

The use of force, outside self-defence, should remain illegal until international community agree about the use of humanitarian intervention in international treaty. When sovereign states are unwilling or unable to protect their own citizens from avoidable catastrophe, that responsibility must be borne by the broader community of states. The main questions are who should exercise that responsibility, under whose authority and when, where and how in order to avoid the possibility of abuse of the doctrine. International community still did not find the answers. A new international consensus on these issues is extremely needed.

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